

COMPETITION AUTHORITY OF KENYA



Block Exemption Guidelines on Certain Covid-19 Economic Recovery Priority Sectors.

PREFACE

The Competition Authority of Kenya (hereinafter the Authority) recognizes that the Covid-19 Disease has caused economic disruptions in our economy. The Authority takes cognizance that careful relaxation of the Competition Laws is necessary to spur Post-Covid Economic Recovery order to cushion certain economic priority sectors against the economic effects of the Covid-19 disease with the objective of spurring the Economic Recovery in general to ensure that markets continue to deliver to consumers by striking a balance of cushioning key economic sectors from the shocks of Covid-19 and ensuring that the merits of competition are not undermined.

In order to realize this, section 30(2) Competition Act No. 12 of 2010, of the Act provides that the Authority may, with the approval of the Cabinet Secretary, by notice in the Gazette, exclude any category of decisions, practices or agreements by or between undertakings from the application of the provisions this Part III of the Act.

The Authority has therefore prepared guidelines for certain economic priority sectors selected based on their contribution to the economy, the Economic Recovery Strategy (ERS), the ability of the sectors to self-correct in the short-run and the extent of impact of the Covid-19 disease on the said sectors.

The object of the block exemption guidelines is to issue clear guidance to support the economic recovery of specific critical economic recovery of sectors which were heavily impacted by the Covid19 disease,, define forms of cooperation that will benefit consumers in the post Covid-19 Economic Recovery context, explain the self-analytical framework that businesses will use in determining whether an undertaking qualifies for the category exemption during the post Covid-19 period, achieving transparency and predictability in the market regarding the grant of block exemptions, consistency in analysis and application of the law, reduction in transactional costs and allowing the Authority to concentrate its resources on agreements which are likely to distort competition in the economy.

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A. Introduction

1. These Guidelines shall be known as the Post Covid-19 Economic Recovery Block Exemptions Guidelines (PCBEG) under section 30(2) of the Competition Act No. 12 of 2010 (“Act”). These BEG are geared towards supporting the Government agenda of spurring the economic recovery and ensuring that markets continue to deliver to consumers by careful relaxation of the competition law to allow post COVID -19 essential collaboration.
2. The PCBEG are not a substitute for the Act and the Competition (General) Rules made under the Act and must therefore, be read in conjunction with the Act, Rules and other guidelines.
3. The Authority recognizes that exceptional circumstances surrounding the post-COVID-19 pandemic may require businesses to collaborate to deal with the effects of the crisis to spearhead recovery of the economy while and ensuring security of supply of essential goods and services. The Authority is further mindful of the importance of maintaining competitive markets in Kenya
4. By issuing these Guidelines, the Authority provides direction to undertakings in making a self-assessment as to whether the agreements, decisions or practices which they intend entering into will qualify for block exemption within the Covid-19 Economic Recovery Context without the need to seek the Authority’s intervention.

B. Legal Framework

5. Part III of the Act prohibits restrictive business practices ranging from agreements and/or concerted practices by parties either in horizontal or vertical relationships and trade associations (section 21 & 22). The Act, however, provides for exemption of some of those prohibited practices.

6. Section 30 (2) of the Act provides that the Authority may, with the approval of the Cabinet Secretary, by notice in the Gazette, exclude any category of decisions, practices or agreements by or between undertakings from the application of the provisions of Part III of the Act or otherwise referred to as block exemptions.
7. Rule 23 and 24 of the Competition (General) Rules, 2019 shall apply. Specifically rule 23 states that Section 30 (2) of the Act shall apply to vertical restraints included in practices, decisions or agreements between undertakings and agreements entered into for purposes of exports.
8. Further, Rule 24. (1) of the Competition (General) Rules, 2019 provides that in determining the category of practices, decisions, or agreements that warrant grant of block exemptions under section 30, the Authority shall be guided by the Block Exemption Guidelines which inter alia considers: -
 - i. the market shares of each of the undertakings which are party to the agreement;
 - ii. whether or not the agreements have any restrictions;
 - iii. the nature of the markets; and
 - iv. any other relevant consideration.

Notwithstanding Rule 24(1), agreements for purposes of export shall be eligible for exemption under this Part.

C. Scope.

Scope of the Guidelines

9. The PCBEG covers the Manufacturing, Private Healthcare, Aviation, Travel & Hospitality, and Health Research.

D. Guiding Principles

10. The Authority considers that competition will be maintained during this period. The Authority may allow for collaborative competition in circumstances where



there is severe imbalance between demand and supply, logistical challenges and development of new products which will be considered beneficial to consumers.

11. The Guidelines adopts the following self-assessment principles as the criteria for the grant of these exemptions;

- v. The measures to coordinate action taken by businesses are temporary with defined timelines and scope of collaboration;
- vi. The measures are appropriate and necessary to avoid a shortage, or ensure security of supply;
- vii. The measures are in the public interest, such as creation of employment;
- viii. The measures deal with critical issues that arose as a result of the Covid-19 pandemic, that is the measures should address concerns related to the Covid-19 disease; and
- ix. Collaboration on prices will be prohibited and price competition should be maintained at all times irrespective on the level of information exchange; and collaboration.

12. To assist businesses in more confidently making their own assessment in the specific circumstances of the coronavirus pandemic, the Authority offers the following guidance:-

- i. Cooperation that ensures essential goods and services can be made available to the public or an important sub-set of the public such as vulnerable consumers will be considered efficiency-enhancing.
- ii. If without the cooperation there would have been significant shortages of a product, the cooperation will be likely to give consumers a fair share of the benefits if it avoids or mitigates those shortages
- iii. In determining whether the cooperation is indispensable to achieve the efficiency, the key factor will be whether in the circumstances and limited time available to consider alternatives, the cooperation can reasonably be considered necessary.

iv. In applying the above guiding principles, the Authority will consider that it is important that competition remains wherever possible. For instance, if it is necessary to share capacity information there may still be room for competition on price.

I. Manufacturing

13. According to the ERS the disruptions in global supply chain and imposition of curfew and other containment measures have adversely impacted manufacturing sector leading to revenue and job losses across all of its sub-sectors.
14. In order to support the economic recovery and growth in the manufacturing sector and in the spirit of “Buy Kenya Build Kenya” initiative Authority exempts the application of the prohibitions of section 21 and 22 of the Competition Act to:
- i. Collaboration between undertakings in horizontal relationships to allow for manufacture and distribution of furniture, stationary, beverages, uniforms, ventilators, medical equipment for public institutions including Government hospitals and Schools whose joint market shares does not exceed 15% of the relevant market. Market shares will be determined on the basis of the average market sales or any other reliable market information parameter in the relevant market for the preceding three (3) years
 - ii. Collaboration between pharmaceutical industries manufacturers shall be limited to the manufacturing and distribution of Covid-19 vaccines and Covid-19 related pharmaceutical products; or
 - iii. Collaboration by non-pharmaceutical undertakings in manufacture and distribution of Covid-19 related equipment only.



II. Private Healthcare

15. The Health Sector is imperative to the health and actively participates in social and economic activities. We have taken cognizance that the “flattening the curve” initiatives undertaken at the onset of the pandemic may have reduced the demand for private healthcare services and created new costs for private healthcare providers and a cash crash according to a world bank report on impact of corona virus disease on private healthcare in developing countries. These sentiments were further echoed by stakeholders from the private healthcare that Authority interacted with during the development of these guidelines.
16. In order to cushion private health care from the effects of the pandemic and pave way for the economic recovery of the sector, the Authority exempts the application of the prohibitions of section 21 and 22 of the Act to the Private Health care to allow them to: -
- i. Collectively through their industries association lobby financial institutions for favorable credit term including interest payable;
 - ii. Collectively lobby insurance companies in relation to credit periods in which insurance companies should honor their claims;
 - iii. Coordinate in relation to procurement of various Covid-19 consumables and pharmaceuticals to ensure the same is procured in an efficient manner should the Covid—19 disease subsist in the short run.

III. Health Research Services

17. The Authority recognizes that the collaboration relating to the research in the developing of Covid-19 related diagnostics, vaccines, treatments, is necessary to put the country on the path of economic recovery. The Authority further takes



cognizance of the crucial role that Health Research firms continue to play in the Economic Recovery Context.

18. The Authority therefore, grants exemption from the application of the prohibitions of section 21 and 22 of the Act in relation to:

- i. Collaboration towards acquisition and improvement of medical research laboratories and equipment;
- ii. Collaboration in the attainment of Joint Intellectual Property Rights in Covid-19 related inventions to allow for recoup of investment;
- iii. Collaboration in the licensing and distribution of the Covid-19 Vaccines with aim of ensuring efficient distribution; and
- iv. Allow for “Most Favored Nation (MFN)” clause in distribution agreements to ensure that the Kenyan populace are granted priority in the distribution of vaccines within the region. The MFN clause will allow that Kenyan populace is accorded priority in the distribution of vaccines.

IV. **Horticulture Farming and Export**

The global lockdown hit both large and small commercial farmers hard. When the European Market shut down, Kenyan Horticultural farmers suffered losses with nowhere to take their fresh flowers, fruits and vegetables. Kenya’s horticulture industry was estimated to be losing about EU \$3 million a day, according to Industry trade group COLEACP during the lockdown period.

19. In order to improve the sector, the Authority grants exemptions in relation to: -

- i. Collaboration by horticultural farmers dealing in fruits, vegetables and flowers meant for the export relating to joint marketing in export markets;
- ii. Collaboration horticultural farmers dealing in fruits, vegetables and flowers meant for the export relating to joint consolidation and inland freight; and
- iii. Collaboration horticultural farmers dealing in fruits, vegetables and flowers meant for the export relating to lobbying shippers for favorable shipping terms.

V. Aviation, Travel and Tourism Industry

20. The aviation tourism and travel industry has been affected more so by the containment measures of lock down and social distancing that had put in place during the first phase of the pandemic. The Authority therefore, grants exemption from the application of the prohibitions of section 21 and 22 of the Act in relation to: -

- i. Collaboration in relation to planning of schedules and marketing among airline operators with a view of facilitating connections for passengers from one airline to the other provided that effective competition is guaranteed;
- ii. Collaboration between travel agents relating to the acquisition of customers, filling of vans and airlines to allow efficient use of resources; and
- iii. Coordination in relation to transportation or shipping of procurement of various consumables, masks hands sanitizers, water sanitation, disinfectants and anti-viral products.

E. Period of PCBEG and Review

21. These PCBEG are valid from the date of gazettelement and for a period of two years however the Authority shall undertake review of the market periodically to establish if there are major changes in the market that may warrant a review of the guidelines and/ or exit/expiry of the guidelines.